UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 04-56-P-H***
	)	
B.J. ALMEIDA,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

B.J. Almeida, charged with possessing, with intent to distribute, five or more grams[1] of cocaine base, also known as crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), seeks to suppress statements and other evidence purportedly obtained in contravention of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). *See* Superseding Indictment (Docket No. 28); Motion To Suppress, etc. ("Motion") (Docket No. 17). An evidentiary hearing was held before me on August 4, 2004 at which the defendant appeared with counsel. Immediately after the close of evidence I heard oral argument. In addition, prior to the hearing, I directed both parties to brief the question of the impact, if any, of a recently decided Supreme Court case, *United States v. Patane*, 124 S. Ct. 2620 (2004), on the instant Motion. *See* Procedural Order (Docket No. 24). With the benefit of the resultant briefs, and based on the evidence adduced at the hearing, I recommend that the following findings of fact be adopted and that

[1] The specific drug quantity charged for sentencing purposes is 11.2 grams.

the Motion be denied.

I. Proposed Findings of Fact

At approximately 5 p.m. on April 21, 2004 several officers of the Lewiston Police Department ("LPD"), including Gregory D. Boucher and Wayne Clifford (the latter in plainclothes), were engaged in surveillance of a three-decker apartment house at 35 Vail Street in Lewiston, Maine. *See* Affidavit of Gregory D. Boucher ("Boucher Aff."), Gov't Exh. 1, ¶ 2.[2] Boucher, a nine-year veteran of the LPD, was assigned to the Maine High Intensity Drug Trafficking Area Task Force of the U.S. Drug Enforcement Administration in Portland, Maine. *See id*. ¶ 1. LPD officers had placed 35 Vail Street under surveillance after Boucher's fellow officers told him that they had received information from sources in the community that drugs (including but not limited to cocaine base) were being distributed from that address. *See id*. ¶ 2. Boucher had also received the same type of information concerning the same address directly from a confidential informant in Lewiston who had provided him reliable information on several occasions in the past. *See id*.

Boucher initiated "rolling surveillance" of a vehicle after he observed it pick up a black male outside of 35 Vail Street. *See id*. ¶¶ 3 & 3(a). He called uniformed LPD officer Eric Syphers to the scene of the surveillance to assist in stopping the vehicle. *See id*. ¶ 3. After Syphers and Boucher observed the vehicle fail to stop at a stop sign, Syphers pulled it over in the parking lot of a Big Apple convenience store at 248 Main Street in Lewiston. *See id*. ¶ 3(a). Clifford followed in a separate car. During the minute or two during which Boucher tailed the vehicle prior to pulling it over, he did not observe any furtive movements on Almeida's part; however, he testified that rolling surveillance generally is done from a distance, and he

would not necessarily have been in a position to observe such movements. Syphers and Clifford approached the vehicle and talked to the driver, who identified himself as Andrew Ash, and the vehicle's two passengers, a white male sitting in the front seat who identified himself as Vernon Milliken and a black male sitting in the back seat who identified himself as B.J. Almeida. *See id*. ¶3(b).

Ash exited the vehicle and told Syphers that Almeida had asked to be dropped off on Vail Street and then picked up as soon as he called Ash on his cellular telephone – a statement that was consistent with observations Boucher had made during surveillance of 35 Vail Street. *See id*. ¶ 3(b)(1). After obtaining Ash's permission to conduct a pat-down search, Clifford searched him and recovered more than $1,000 in cash from one of his pockets, which was consistent from Boucher's training and experience with amounts of cash frequently carried by people who are involved in the drug-distribution trade. *See id*. ¶ 3(b)(2). After Ash told Clifford that he had nothing to hide and that the officers were free to search his vehicle, they searched it and recovered a "crack pipe" of a type Boucher knew from his training and experience is commonly used to ingest cocaine base. *See id*. ¶ 3(b)(3).[3] Clifford testified that he retrieved the glass pipe, which he, too, testified is commonly known as a "crack pipe" and which he noted contained residue, from under the right front seat. He also found marijuana in the car's center console. He did not recall finding any obstructions underneath the seat that would have precluded Almeida from placing the pipe in the spot where it was found, but he also did not recall whether that area was clear of obstructions. He testified nonetheless that it would have been easy for Almeida to reach around the console and place the pipe under the front seat.

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[2] This exhibit was admitted without objection at the evidentiary hearing.

[3] Clifford testified that he asked Ash whether he had any illegal drugs or weapons and whether he would mind if he *(continued on next page)*

Clifford and Boucher spoke to Milliken, who informed them that he and Ash had picked up Almeida in Gray, Maine, driven to Lewiston and dropped him off so that he could "score some crack" for them on the third floor of the triple-decker apartment house. *See id*. ¶ 3(b)(4). This statement was consistent with observations Boucher had made earlier in the evening while conducting surveillance of Almeida entering the building. *See id*.

Clifford spoke to Almeida, who remained seated alone in the vehicle, through an open window. He identified himself as an LPD officer and advised Almeida that officers had observed him conducting activities that appeared consistent with the purchase or sale of illegal drugs. Almeida denied having any involvement in illegal activities. Almeida told Clifford that Ash and Milliken had picked him up on the street. When Clifford advised Almeida that he had observed him being dropped off by Ash and Milliken earlier, Almeida said he was just visiting friends (whose names he refused to give). Clifford asked Almeida if he would mind if he searched his person for any drugs or weapons. He did not advise Almeida that he had a right to refuse consent. Almeida said that would be fine. Clifford patted Almeida down, finding $851 in cash in his pants pocket.[4]

Boucher spoke privately to Milliken, who told him that Almeida was concealing cocaine base in his crotch area. *See id*. ¶ 3(b)(6). Boucher then approached Almeida, advised him that he knew he had cocaine base hidden in his crotch area and suggested that he "do the right thing" and surrender it. *See id*. Almeida stated, "Yeah, I got something." *See id*. Boucher observed him reach into his pants and remove a clear plastic bag from his crotch area containing a substance that he told Boucher was "crack" and which

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searched his person and vehicle, whereupon Ash responded, "Sure. I have nothing to hide."

[4] To the extent that Clifford's testimony describing this encounter differed from Boucher's account in his affidavit, I have *(continued on next page)*

Boucher recognized from his training and experience was cocaine base. *See id*. This exchange with Boucher took place approximately five minutes after Almeida had consented to a search of his person for drugs or weapons. Boucher subsequently surrendered the plastic bag and contents to special agent Matthew Cashman of the Maine Drug Enforcement Agency, who advised Boucher that he conducted a field test on the substance, obtaining positive results for the presence of cocaine base and obtaining a gross weight (including packaging) of approximately twelve grams. *See id*. The residue in the crack pipe also tested positive for the presence of cocaine base.

Boucher testified that he would have arrested Almeida based on the discovery of the crack pipe in the vehicle even in the absence of the retrieval of cocaine base from Almeida's pants. Following that arrest, he would have transported him to the Androscoggin County Jail for processing, where, per normal jail protocol with which Boucher is familiar, Almeida would have been strip-searched. Boucher testified that he had no doubt the cocaine base hidden in Almeida's pants would at that point have been discovered.

Clifford testified that even in the absence of the discovery of crack on Almeida's person, he would have arrested all three occupants of the vehicle on the basis of the discovery of the crack pipe and/or the marijuana inasmuch as it is common practice to arrest for possession of a Schedule W drug and none of the occupants had owned up to possession of those items.[5] No arrests were immediately made upon discovery of those two items inasmuch as interviews were still being conducted. Clifford testified that, in his experience, the processing procedures at Androscoggin County Jail were as described by Boucher and that there was no doubt in his mind the crack cocaine in Almeida's pants would have been discovered upon

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credited Clifford's version. Boucher made clear at hearing that his knowledge of this encounter was second-hand.

[5] Cocaine base is classified as a Schedule W drug. *See* 17-A M.R.S.A. § 1102(1)(F)(2)(c). Marijuana is classified as a

(continued on next page)

processing at the jail.

All three occupants of the vehicle ultimately were arrested and charged with trafficking in cocaine. Almeida was charged with possession of the crack handed over to Boucher but never charged with possession of the crack pipe.

II. Discussion

At hearing, defense counsel clarified that Almeida's motion implicates three related but segregable components of evidence, all of which Almeida contends were elicited in response to custodial interrogation without benefit of *Miranda* warnings: his statement, "Yeah, I got something," his act of producing the crack from his pants and the crack itself.[6] Counsel for the government represented in his memoranda of law, and stipulated at hearing, that (i) Almeida was "in custody" for purposes of *Miranda* when Boucher asked him to turn over the hidden crack,[7] and (ii) the government will not seek to introduce in its case-in-chief the oral statement made by Almeida ("Yeah, I got something."). *See* Government's Objection to Motion To Suppress Evidence, etc. ("Objection") (Docket No. 21) at 3-4; Government's Supplemental Memorandum Addressing Motion To Suppress Evidence, etc. ("Government's Supplemental Memorandum") (Docket No. 25).[8]

Schedule Z drug. *See id.* § 1102(4)(B).

[6] Per *Miranda*, an accused must be advised prior to custodial interrogation "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 478-79.

[7] "The obligation of an officer to administer *Miranda* warnings attaches only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Stansbury v. California*, 511 U.S. 318, 322 (1994) (citations and internal quotation marks omitted).

[8] At hearing, without objection by defense counsel, counsel for the government corrected a sentence on page two of his initial brief, noting that it should have read: "After observing the Chevrolet *fail to* come to a complete stop at a stop sign, Syphers put on his blue lights and pulled over the Chevrolet into the parking lot of the Big Apple convenience store on Main Street." *See* Objection at 2 (added words emphasized).

Nonetheless, at oral argument, counsel for the government contended that the manner of recovery of the crack, and the crack itself, are admissible on any or all of the following grounds: that (i) the *Miranda* rule does not apply, the government having found no authority supporting the proposition that Almeida's act of reaching into his pants to produce the crack is tantamount to a verbal statement, (ii) Almeida consented to the search (that is, the consent given to Clifford covered the exchange with Boucher), (iii) even absent recovery of the crack from Almeida's person at the scene of the Lewiston traffic stop, the government inevitably would have discovered it inasmuch as Almeida would in any event have been arrested and then strip-searched upon processing at the Androscoggin County Jail, and (iv) recovery of the drugs is admissible pursuant to *Patane*. *See also* Objection at 3-6; Government's Supplemental Memorandum.

I am persuaded that, assuming *arguendo* that LPD officers transgressed *Miranda* in obtaining the crack from Almeida's person, the crack and the manner of its recovery nonetheless are admissible pursuant to the inevitable-discovery exception. I therefore do not consider the government's alternative bases for their admission.

Pursuant to the inevitable-discovery doctrine, "[i]f the prosecution can establish by a preponderance of the evidence that the [unlawfully obtained] information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received." *Nix v. Williams*, 467 U.S. 431, 444 (1984). The First Circuit has crystallized the doctrine into a three-part test: "[A]re the legal means truly independent; are both the use of the legal means and the discovery by that means truly inevitable; and does the application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken fourth amendment protection?" *United States v. Ford*, 22 F.3d 374, 377 (1st Cir. 1994) (citation and internal quotation marks omitted).

A. Independent Legal Means

As a threshold matter, I conclude that both the crack itself and the fact of its concealment in Almeida's pants would have been discovered by an independent "legal means." Both Boucher and Clifford testified that regardless whether the crack had been recovered from Almeida's pants, they would have placed him under arrest on the basis of the discovery of the crack pipe in the vehicle in which he was a passenger. That discovery, made as a result of the consent of the driver, Ash, to a search of the vehicle for drugs or weapons, had nothing to do with (and thus was independent of) Boucher's request that Almeida turn over the drugs believed to be concealed in his pants.

I further conclude that Almeida's arrest predicated on discovery of the crack pipe would have been lawful. In Maine, "a person is guilty of unlawful possession of a scheduled drug if the person intentionally or knowingly possesses what that person knows or believes to be a scheduled drug, which is in fact a scheduled drug," and the drug is a Schedule W drug. 17-A M.R.S.A. § 1107-A(1)(C). Such a person is guilty of a Class D crime unless, *inter alia*, he or she (i) possesses more than four grams of cocaine base, in which case he or she is guilty of a Class B crime, or (ii) he or she possesses cocaine base and has been convicted of any offense relating to scheduled drugs, in which case he or she is guilty of a Class C crime. *See id*. § 1107-A(1)(A)-(C). Possession even of a small quantity of cocaine (such as residue) is sufficient to sustain a conviction pursuant to 17-A M.R.S.A. § 1107-A(1)(C). *See, e.g.*, *State v. McGowan*, 541 A.2d 1301, 1302 (Me. 1988) ("In his first argument, the defendant essentially contends that the amount of cocaine found in the containers was so minute as to be insufficient under Maine law to support a conviction for a violation of 17-A M.R.S.A. § 1107 (1983). . . . Under the statute as it now reads, a person may be convicted for unlawful possession of *any* amount of cocaine. Since the residue in the containers tested

positive for cocaine, there was sufficient evidence of defendant's possession within the meaning of 17-A M.R.S.A. § 1107 (1983) to support the jury's verdict.") (emphasis in original). The Law Court has held that "[p]ossession may be either actual or constructive. . . . Constructive possession means that although one does not have actual physical control of the goods, he has dominion, authority or control over them." *State v. Kremen*, 754 A.2d 964, 968 (Me. 2000) (citations and internal quotation marks omitted).[9]

Had the officers arrested Almeida in connection with the discovery of the crack pipe, his arrest would have been accomplished without a warrant. "A warrantless arrest must be justified by probable cause." *Blackstone v. Quirino*, 309 F. Supp.2d 117, 126 (D. Me. 2004). "The probable cause standard requires that at the time of arrest the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Id*. at 126-27 (citation and internal quotation marks omitted).

Officers Clifford and Boucher had probable cause to believe that the pipe they retrieved from the vehicle contained the residue of a Schedule W drug, cocaine base. From Boucher's experience and training

[9] A parallel provision of federal law prohibits, with exceptions not here relevant, simple possession of a "controlled substance," a crime that is punishable, absent certain aggravating circumstances, by imprisonment of not more than one year and a fine in a mandatory minimum amount of $1,000, or both. *See* 21 U.S.C. § 844(a). Cocaine base is a Schedule II controlled substance. *See id*. § 812(c)(Sched. II)(a)(4); *United States v. Manzueta*, 167 F.3d 92, 93 (1st Cir. 1999). The possession of even a trace of a controlled substance suffices for purposes of section 844(a). *See, e.g., United States v. Weeks*, No. 92-5377, 1993 WL 430191, at **1 (4th Cir. Oct. 25, 1993) ("Section 844 contains no quantitative amount; a trace of a controlled substance is sufficient to support a conviction under the statute."). Constructive, as well as actual, possession can support a conviction. *See, e.g., United States v. Carlos Cruz*, 352 F.3d 499, 510 (1st Cir. 2003) ("Constructive possession may be proved by demonstrating defendant's power and intent to exercise ownership, dominion, or control over the contraband itself, or over the area in which the contraband was concealed. Constructive possession may be sole or joint and may be achieved directly or through others.") (citation and internal quotation marks omitted). For the same reasons as I conclude the officers lawfully could have arrested Almeida on state charges in connection with discovery of the crack pipe, they lawfully could have arrested him on a charge of violating 21 U.S.C. § 844(a).

– which included assignment to a drug task force – he recognized the pipe as being a distinctive "crack pipe" used to ingest cocaine base. In addition, Boucher and other LPD officers had witnessed Almeida enter and shortly thereafter exit an apartment that they had been informed by sources in the community (at least one of whom was known to be a reliable confidential informant) was being used to transact cocaine-base sales.

The officers also had probable cause to believe that Almeida constructively possessed the pipe. As defense counsel suggested at oral argument, mere status as a passenger in a vehicle does not suffice to prove the exercise of dominion and control over contraband found in that vehicle. *See, e.g., State v. Field*, 383 A.2d 1390, 1391 (Me. 1978) ("Merely being a passenger in a vehicle in which are found stolen goods, there being no evidence of the exercise or any possessory rights either to the vehicle or the stolen goods by such passenger, is insufficient evidence, standing alone, upon which to base a finding of guilt of the larceny of the personalty or of the burglary, if such is charged."). Nonetheless, in this case there was more.

Almeida had earlier been observed entering and exiting an apartment that police suspected, based on reliable information, was being used to deal in cocaine base. At the scene of the traffic stop Milliken told Clifford and Boucher that he and Ash had picked up Almeida in Gray, Maine, driven to Lewiston and dropped him off so that he could "score some crack" for them on the third floor of the triple-decker apartment house. This account was consistent with the activities the officers themselves had earlier observed while conducting surveillance. Thus, they reasonably could have inferred that the three occupants of the car were engaged in a joint enterprise. A large amount of cash – consistent in Boucher's experience with amounts carried by individuals engaged in the drug trade – was found on Ash's person, and nearly as much cash was found on Almeida's person. None of the occupants owned up to possession of the crack

pipe; therefore, none excluded the others as a suspect.

As defense counsel emphasized, neither officer observed Almeida handling the crack pipe or displaying furtive movements suggesting that he was secreting it under the seat in front of him. However, Boucher testified that he would not necessarily have been in a position to see such movements while tailing the vehicle, and Clifford testified, based on his observation of the car's interior, that even if the area under the seat were obstructed (he did not recall if it was or was not), Almeida easily could have reached around the center console and placed the pipe in the position in which it was found. Finally, Almeida's responses to the officers' initial questions were evasive, with Almeida for example stating that Ash and Milliken had picked him up off the street and then, when confronted on this, asserting that he was visiting friends.

This may not all add up to proof beyond a reasonable doubt that Almeida constructively possessed the pipe. But that is not the standard. An officer's conclusion need not be "ironclad" or even "highly probable"; it need only be "reasonable" to satisfy the standard of probable cause. *United States v. Winchenbach*, 197 F.3d 548, 555-56 (1st Cir. 1999); *see also, e.g., Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 255 (1st Cir. 1996) ("[O]ne who asserts the existence of probable cause is not a guarantor either of the accuracy of the information upon which he has reasonably relied or of the ultimate conclusion that he reasonably drew therefrom."). Under the totality of the circumstances, there was probable cause to believe that Almeida constructively possessed the crack pipe found underneath the seat behind which he was sitting. *See, e.g., Maryland v. Pringle*, 124 S. Ct. 795, 800-01 (2003) ("In this case, Pringle was one of three men riding in a Nissan Maxima at 3:16 a.m. There was $763 of rolled-up cash in the glove compartment directly in front of Pringle. Five plastic glassine baggies of cocaine were behind the back-seat armrest and accessible to all three men. Upon questioning, the three men failed to

offer any information with respect to the ownership of the cocaine or the money. We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.") (footnote omitted).

B. Inevitable Discovery

I next must consider whether the government has proved by a preponderance of the evidence that, had Almeida been arrested in connection with discovery of the crack pipe, the cocaine base secreted in his pants inevitably would have been found. The government readily carries this burden.

The First Circuit has noted that "[t]he term 'inevitable,' although part of the *Nix* doctrine's name, is something of an overstatement. The facts of *Nix* itself – a body hidden in an area of many square miles – show that what is required is a high probability that the evidence would have been discovered by lawful means." *United States v. Rogers*, 102 F.3d 641, 646 (1st Cir.1996).

Boucher testified that upon Almeida's arrest, he would have transported him to Androscoggin County Jail, that the jail routinely strip-searches incoming detainees as part of its intake processing and that there was no doubt in his mind that the cocaine base hidden in Almeida's pants would have been discovered during that processing. Clifford testified to the same effect. That testimony is uncontroverted. I therefore find that the cocaine base hidden in Almeida's pants inevitably would have been discovered had he been arrested in connection with the retrieval of the crack pipe. *See, e.g., United States v. Pardue*, 270 F. Supp.2d 61, 67 (D. Me. 2003) (record established that "[a]s a result of Defendant's lawful arrest, the ammunition would have inevitably been discovered during the security search at the Cumberland County Jail

or when Officer Coyne inventoried the contents of the backpack in order to store the backpack in the Portland Police Department's property locker.").

C. Incentive for Police Misconduct

Almeida presents no argument that the application of the inevitable-discovery exception in this case would significantly weaken Fourth Amendment protections or provide an incentive for police misconduct, nor do I perceive that it would do so. Indeed, there is a serious question whether *Miranda* and its animating principles even apply to the crack cocaine that Almeida handed over or the manner in which he produced it. *See Patane*, 124 S. Ct. at 2626 ("[T]he *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause. The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is no justification for extending the *Miranda* rule to this context. . . . The Clause cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements").

III. Conclusion

For the foregoing reasons, and in view of the government's stipulation that it will not seek to introduce the defendant's unwarned oral statement in evidence, I recommend that his motion to suppress evidence be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument

before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 6th day of August, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Defendant(s)

B J ALMEIDA (1) represented by **NICHOLAS J.K. MAHONEY**
LAW OFFICE OF NICHOLAS J.K. MAHONEY, P.A.
156-160 MAIN STREET
PO BOX 581
BIDDEFORD, ME 04005-0581
207-284-6996
Fax : 207-284-5111
Email: nmahoney@surfglobal.net
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Plaintiff

USA represented by **JONATHAN A. TOOF**
OFFICE OF THE U.S. ATTORNEY
DISTRICT OF MAINE
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257
Email: jon.toof@usdoj.gov

LEAD ATTORNEY
ATTORNEY TO BE NOTICED